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CONGRESSIONAL ACCESS TO NATIONAL SECURITY INFORMATION: PRECEDENTS FROM THE WASHINGTON ADMINISTRATION

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Executive Summary

In testimony and legal analysis, the executive branch often cites precedents established during the Washington Administration to claim that the President has exclusive and plenary authority over national security information and may deny such documents and papers to Congress. Frequently cited is the decision by President George Washington in 1796 to refuse to give the House of Representatives papers it requested concerning the Jay Treaty. Upon closer examination, precedents from the Washington Administration do not support the claim of exclusive and plenary authority by the President. If this were the case, presidential authority to withhold from Members of Congress this type of information would prevent lawmakers from discharging their constitutional duties over legislation, oversight, and investigation. During the period of the Washington Administration, both houses of Congress regularly obtained national security documents and papers and have continued to receive such information to fulfill their constitutional obligations.

Executive Branch Position

On May 14, 2009, the House Oversight and Government Reform Committee held a hearing on “The Whistleblower Protection Enhancement Act of 2009.” Mr. Rajesh De, representing the position of the Department of Justice, referred to precedents from the Washington Administration to claim that the President has exclusive control over national security information and Congress may not interfere with that control.¹ The Department’s position about presidential control over national security information has a direct bearing on the constitutional capacity of Congress to perform its oversight and investigative duties. It also rests on very incomplete and misleading historical grounds. In its testimony, the Department began by acknowledging that Congress “has significant and legitimate oversight interests in learning about, and remedying, waste, fraud and abuse in the intelligence community” (p. 8). It then makes this claim:

¹ Mr. Rajesh De, Deputy Assistant Attorney General, Office of Legal Policy, Department of Justice, available at <http://oversight.house.gov/documents/20090513192835.pdf>, last visited June 1, 2009.

However, as Presidents dating back to President Washington have maintained, the Executive Branch must be able to exercise control over national security information where necessary. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 94-99 (1998) (statement of Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, before the House Permanent Select Committee on Intelligence, tracing history) (pp. 8-9 of the Department's testimony).

The Department noted that Mr. Moss, in testimony before the House Intelligence Committee in 1998, stated that in the context of congressional oversight “the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President.” Mr. Moss concluded that the Constitution “does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information — even to Members of Congress” (id. at 9).

The Department continued: “Putting these differences in constitutional analysis aside, we believe that an extra-agency mechanism within the Executive Branch could offer a way forward to balance the Executive’s need to protect classified information with Congress’s responsibility to help ferret out waste, fraud and abuse” (id.). There are several problems with this analysis: (1) the extra-agency mechanism would concentrate whistleblower complaints exclusively within the executive branch, (2) it would delay the delivery of whistleblower complaints (or even notice) to Members of Congress and congressional committees, and (3) the historical basis for the Department’s position is strained and fragmentary.

The Washington Precedents. In his 1998 analysis, Mr. Moss said that “Presidents since George Washington have determined on occasion, albeit very rarely, that it was necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense or foreign affairs.” 22 Op. O.L.C. 92, 94-95. He discussed the request by the House of Representatives in 1792 for documents on military losses by General St. Clair. President Washington, seeking counsel from his Cabinet, was advised that Congress might call for papers generally but “the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public.” The Executive “consequently w[as] to exercise a discretion” in responding to the House request. President Washington decided to produce all of the requested documents. The language “injure the public” is significant. The injury has to be to the *public*, not to the President or his associates. Presidents were not entitled to withhold documents from Congress because it might embarrass the Administration or reveal improper or illegal conduct. Moreover, whatever theoretical authority the President possessed to withhold certain documents, in this case President Washington released all of the documents to the House for its investigation.

The Moss analysis does not mention an earlier confrontation between Congress and the President regarding access to executive branch papers. In 1790, Treasury Secretary Alexander Hamilton requested financial compensation for Baron von Steuben, who had provided military assistance to America during the Revolutionary War. Members of Congress encountered great difficulty in receiving requested documents. Eventually they obtained what was needed. In a case like this, if lawmakers decided that the Administration was insufficiently cooperative, they could simply refuse to enact the private bill for Steuben. At that point the Administration could decide to abandon its support for the private bill or surrender documents.² Also missing from the Moss analysis is a 1793 House investigation into the official performance of Secretary Hamilton. Lawmakers received a number of executive branch documents in conducting this probe.³

During the Washington Administration, Congress recognized that certain expenditures need not be made public or even explained to the legislative branch, especially in the field of foreign affairs. An Act of July 1, 1790 provided \$40,000 to the President to pay for special diplomatic agents. It was left to the President to decide the degree to which such expenditures should be made public.⁴ In 1793 Congress continued that fund for the purposes of intercourse or treaty with other nations. The President was allowed to make a certificate of such expenditures, with each certificate “deemed a sufficient voucher for the sum or sums therein expressed to have been expended.”⁵ Certificates simply state that funds have been spent without supplying invoices or other documentary evidence on the details of the expenditures. Presidents who withheld information from the public or Congress under these laws did not claim constitutional authority to justify their actions; they pointed to statutory authority granted by Congress.⁶

At various times in these early years, Members of Congress requesting information from the President would acknowledge that he could “exercise a discretion” in deciding what material to submit to the legislative branch, especially if the President determined that disclosure would harm the national interest.⁷ It was not explained why such information could not be submitted to Congress in secret session or under instructions from the President that the information was confidential and must remain so. Those procedures were available, as explained in the next paragraph on the Algerine Treaty and one after that concerning correspondence with France.

² LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 7-10 (2004).

³ Id. at 11-13.

⁴ 1 Stat. 128-29 (1790). The President “shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it inadvisable not to specify, . . .” (id. at 129).

⁵ Id. at 299-300, sec. 2 (1793).

⁶ Louis Fisher, *Confidential Spending and Governmental Accountability*, 47 G.W.L.REV. 347 (1979).

⁷ ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND THE CONSTITUTION 81 (1976).

Algerine Treaty. The Moss analysis of 1998 did not mention President Washington's willingness to share treaty documents with the House in 1793. It was the practice at that time to pay annual bribes ("tributes") to four countries in North Africa: Morocco, Algiers, Tunis, and Tripoli. For a number of years American payments went to those nations to prevent cargoes and crew from being apprehended in the Mediterranean. The Continental Congress had to offer money to recover Americans who had been seized. Other nations, including Russia and Spain, did the same. The four countries were called the "Barbary Powers."⁸

President Washington knew that whatever treaty he entered into with the Senate, he would need support from the House of Representatives for funds. Secretary of State Thomas Jefferson advised Washington to go to both houses for the Algerine Treaty, treating the House the same as the Senate. Whatever treaty documents Washington gave to the Senate he should give to the House. Some Senators objected that the House should not be included in the treaty process.⁹ To Jefferson, if Members of the House had to vote funds to implement the treaty, "why should not they expect to be consulted in like manner, when the case admits."¹⁰

Washington followed Jefferson's advice. Various communications and confidential letters went to each chamber, with the understanding that the documents concerning "the ransom of our citizens" would be kept secret.¹¹ Washington explained that although the public had a legitimate interest in the issue, "it would still be improper that some particulars of this communication should be known. The confidential conversation stated in one of the letters, sent herewith, is one of these." He stated that '[b]oth justice and policy require that the source of that information should remain secret."¹²

The House went into secret session to debate the treaty.¹³ Rep. James Madison rejected the argument that a republican form of government "can have no secrets." It may be necessary for the President to submit "those secrets to the members of the House, and the success, safety, and energy of the Government may depend on keeping those secrets inviolably."¹⁴ After considering the request for several days, Congress authorized and funded the treaty with Algiers.¹⁵

⁸ Letter from Secretary of State Thomas Jefferson, December 28, 1790, 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 100-01 (1833); GERHARD CASPER, SEPARATING POWER 45-46 (1997).

⁹ 1 THE WRITINGS OF THOMAS JEFFERSON 305-07 (Bergh ed. 1903).

¹⁰ Id. at 294.

¹¹ 4 ANNALS OF CONG. 20-21 (1793).

¹² Id.

¹³ Id. at 150-55.

¹⁴ Id. at 150.

¹⁵ 8 Stat. 133 (1795). See CASPER, SEPARATING POWER, at 51-65; FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE, at 30-33.

Correspondence with France. Mr. Moss discussed a dispute in 1794 regarding the Senate's request for correspondence between France and the U.S. minister to France. President Washington provided some correspondence except in "those particulars which, in [his] judgment, for public considerations, ought not to be communicated." 22 Op. O.L.C. at 96. Because the materials were sensitive, he advised the Senate that "the nature of them manifest the propriety of their being received as confidential."¹⁶ Apparently the Senate accepted that Washington could withhold some documents but could have pressed for more. As noted by Abraham Sofaer, "nothing would have prevented a majority from demanding the material, especially in confidence, or from using their power over foreign policy, funds and offices to pressure the President to divulge."¹⁷ Moreover, President Washington did not assert the right to withhold all documents related to national security and foreign affairs. Papers, including sensitive correspondence, were delivered to Congress.

The Jay Treaty. Administrations frequently claim that Congress, or at least one chamber of Congress, was denied national security documents by the Washington Administration in the 1796 dispute over the Jay Treaty. This controversy is widely interpreted to grant unrestricted authority to the President to withhold from Congress national security information. That is a misconception. Even if papers had been kept from the House (which is not true), they were shared with the Senate. As President Washington noted in his message to Congress: "all the papers affecting the negotiation with Great Britain were laid before the Senate, when the Treaty itself was communicated for their consideration."¹⁸ Thus, the Jay Treaty incident is not a precedent for the President to withhold national security information from Congress. The papers of the Jay Treaty were controversial because Jay had departed from treaty instructions and disclosure of that fact and others would have been embarrassing to the Washington Administration.¹⁹

As Mr. Moss explained, when President Washington declined to give the House of Representatives access to Jay Treaty documents he offered this argument: "The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have a pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers." 22 Op. O.L.C. at 96 n.17. According to that excessively broad reading, the President could even withhold treaty documents from the Senate, but very likely at the price of the Senate refusing to consider and approve the treaty.

¹⁶ SOFAER, WAR, FOREIGN AFFAIRS AND THE CONSTITUTION, at 84.

¹⁷ Abraham D. Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1321 (1965).

¹⁸ ANNALS OF CONG., 4th Cong., 1st Sess. 761 (1796).

¹⁹ SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER, at 85.

Furthermore, as Mr. Moss noted, the conventional understanding that the President could withhold treaty documents from the House “had a somewhat ‘academic’ character because the Senate had received all the papers, and the House members apparently could inspect them at the Senate.” 22 Op. O.L.C. at 96-97 n. 17, citing Gerhard Casper, Separating Power 65 (1997).

This observation by Professor Casper deserves closer treatment. Some of the Jay Treaty documents had already been shared with the House. Rep. Edward Livingston, chairman of the House Committee on American Seamen, “together with the whole committee, had been allowed access to these papers, and had inspected them. The same privilege, he doubted not, would be given to any member of the House who would request it.”²⁰ During this period, Congress has passed legislation to provide for the relief and protection of American seamen, many of whom had been impressed by Great Britain.²¹ One member of the House said that with regard to the Jay Treaty papers, “he did not think there were any secrets in them. He believed he had seen them all.”²² He noted that “[f]or the space of ten weeks any member of that House might have seen them.”²³ Another member of the House remarked that his colleagues could have walked over to the office of the Secretary of the Senate to see the papers, but why, he said, “depend upon the courtesy of the Clerk for information which might as well be obtained in a more direct channel?”²⁴ Rep. Robert Goodloe Harper, a supporter of the Administration, admitted that the treaty information had been seen by Livingston and “any member of the House who would request it.”²⁵

In advising the House on March 30, 1796 that it was not entitled to Jay Treaty documents, President Washington said that under the Constitution the only chamber of Congress with a role in treaty matters is the Senate.²⁶ Members of the House did not need to be reminded of such an elementary point. They could read the Constitution. Members of the House wanted the treaty documents not to participate in the treaty process but to make an informed judgment on whether to authorize and fund the Jay Treaty, which required action by both chambers. Rep. Livingston, in requesting the treaty documents, announced that the House possessed “a discretionary power of carrying the Treaty into effect, or refusing it their sanction.”²⁷ Rep. Albert Gallatin agreed that the House did not have to automatically support treaties entered into by the President and the

²⁰ ANNALS OF CONG., 4th Cong., 1st Sess. at 461 (remarks of Rep. Harper).

²¹ Id. at 802-20.

²² Id. at 642 (remarks of Rep. Williams).

²³ Id.

²⁴ Id. at 588 (remarks of Rep. Freeman).

²⁵ SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER, at 89.

²⁶ ANNALS OF CONG., 4th Cong., 1st Sess. 761 (“the power of making Treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; . . . As therefore, it is perfectly clear to my understanding, that the assent of the House of Representatives is not necessary to the validity of a Treaty; . . .”).

²⁷ Id. at 427-28.

Senate if they encroached upon powers expressly reserved to the House, such as the regulation of trade.²⁸

The House adopted two resolutions (both by the vote of 57 to 35) stating that although the House has no role in making treaties, under the Constitution it could independently decide whether to implement treaties that cover subjects vested in Congress as a whole.²⁹ It could tell the President: “Until we receive the treaty documents we requested, we will not vote on authorizing or funding measures.” In the case of the Jay Treaty, a bill to appropriate funds to implement it passed by the narrow margin of 51 to 48. An earlier test vote showed the House divided 49 to 49, with the Speaker willing to break the tie to support the treaty.³⁰ Had the vote for the treaty fallen short, President Washington would have been under pressure to release sufficient treaty documents to the House to attract the necessary votes.

No Exclusive Power

Mr. Moss included in his 1998 analysis a number of citations to Supreme Court and lower court decisions to “support the view that the President has unique constitutional responsibilities with respect to national defense and foreign affairs.” 22 Op. O.L.C. at 94. However, none of the citations listed in his footnote supports the view that the President’s authority over national security information is in any sense plenary or exclusive. Instead, the footnote demonstrates that those decisions typically refer to the President as having “broad powers,” “primary power,” “primary responsibility,” or granted “broad leeway.” Those citations do not justify the claim by Mr. Moss that “the Framers’ considered judgment, embodied in Article II of the Constitution,” means that “all authority over matters of national defense and foreign affairs is vested in the President as Chief Executive and Commander in Chief.” Id. at 100.

A few lines after making the above claim, Mr. Moss acknowledged that there is a need to find a balance “between the competing executive and legislative interests relating to the control of classified information.” Id. He stated in Note 31 on that page: “This is not to suggest that Congress wholly lacks authority regarding the treatment of classified information . . .” A page later Mr. Moss referred to the “traditional, case-by-case process of accommodating the competing needs of the two branches — a process that reflects the facts and circumstances of particular situations.” Id. at 101.

The President does not have plenary or exclusive authority over national security information. The scope of the President’s power over national defense and foreign affairs depends very much on what Congress does in asserting its own substantial authorities in those areas.

²⁸ Id. at 437, 466-67.

²⁹ FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE, at 37.

³⁰ ANNALS OF CONG., 4th Cong., 1st Sess. 1280, 1291.